



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC PETITION NO 1 OF 2019

IN THE MATTER OF ARTICLES 3, 9, 20, 22, 23, 40, 50, 64, AND 159 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLE 40
AND 64 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF CONTRAVENTION OF THE RIGHT TO PROPERTY

AND

**IN THE MATTER OF FRAUDULENT REGISTRATION OF TITLE NO. LAND PARCEL MARMANET /MALEWA/BLOCK
1/2720 (MUHOTETU)**

BETWEEN

JOSEPH MUIRU KABIRA.....1st PETITIONER

JOSEPH KIRAGU KARIUKI.....2nd PETITIONER

VERSUS

PATRICK KIRIKA KARANJA.....1st RESPONDENT

STEPHEN WACHIRA IHIGA.....2nd RESPONDENT

RULING

1. In the their Petition dated and filed the 26th March 2019, the Petitioners herein sought for the following reliefs;

- i. A declaratory order holding that the 12 acre LR Marmanet/Malewa/block 1/2720 (Muhotetu) Nyahururu Sub County in Laikipia County absolutely vests in the 1st and 2nd Petitioners respectively as co-owners.
- ii. A declaratory order holding that the 1st and 2nd Respondents fraudulently transferred 12 acre of LR Marmanet/Malewa/block 1/2720 (Muhotetu) Nyahururu Sub County in Laikipia County unconstitutionally against Article 40.
- iii. Any other relief that this Honorable Court may deem just and appropriate to safeguard the fundamental rights and freedoms contained in Articles 27, 38 and 40 of the Constitution in relation to the Petitioner herein and the broader Kenyan public.

2. Alongside the said Petition, the Petitioners had also sought for interim orders of injunction against the Respondents, wherein the court held that the orders so sought would amount to an eviction of the Respondents which was premature at that stage. There were orders that the said

application be served upon the Respondents for inter parte hearing and in the meantime, the Respondents be restrained from committing any acts that would amount to wastage, destruction and/or alienation of the suit land.

3. Pending the hearing of the application inter parte, the Respondents herein filed a Preliminary Objection dated the 8th April 2019 in which they sought to have the Petition struck out for reasons that first, it did not raise any Constitutional issues that needed to be adjudicated upon in a Petition and secondly, that the Petition was fatally defective, misconceived, bad in law and an abuse of the court process for it did not disclose any Constitutional cause of action that was to be addressed in form of a Petition.

4. Upon parties having exchanged their pleadings, by consent, they had agreed that the Preliminary Objection dated the 8th April 2019 be disposed of in the first instance by way of written submissions.

Respondents' Submission.

5. The Respondent's submission in support of their Preliminary Objection was to the effect that from the reliefs sought by the Petitioners, their Petition herein did not raise any Constitutional issues.

6. That to begin with, the present Petition and not enjoined any state organ in the Petition as the prayers sought were only against the Respondents herein.

That the ground in support of the Petition was that the 1st Respondent fraudulently acquired the suit land and later transferred it to the 2nd Respondent. The Petitioners gave full details on the fraudulent acts allegedly committed by the Respondents, and their cause of action was therefore the Respondents' purported acts of fraudulently acquiring the suit land. It was the Respondents' submission that this course of action had redress under the Land Act as there was no Constitutional issue that could be raised in the private course of action as was held in the case of **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR**

7. While relying on the case of **Maggie Mwauki Mtalaki vs The Housing Finance Co. of Kenya [2015] eKLR**, the Respondents' submission was that the Constitution should not be used to determine private law issues.

8. That further, it was evident to from their replying affidavit that there was pending another suit being Nakuru ELC No. 262 of 2012 that involved the same parties herein and that the issues in that suit were substantially the same as the issues in the present suit. That by filing the current application therefore, the Petitioners were on a fishing expedition and as such, were abusing the process of the court. That since the Petition did not rise any Constitutional issues, it ought to be struck out with costs.

Petitioners' Submissions.

9. The Petitioners, submissions while opposing the Respondents' Preliminary Objection was that a Constitutional Petition was the litigation initiated either to challenge breach of Constitutional provisions or violation or infringement of rights and fundamental freedoms granted or recognized by the Constitution.

10. That the Applicants/Petitioners herein had clearly stated in clear terms that the Respondents had violated their fundamental rights and freedoms as provided for under Article 40 and 63 of the Constitution by fundamentally depriving them there legally registered property being LR Marmanet/Malewa/block 1/2720 (Muhotetu).

11. That it was an established principle of law that anyone who wished the court to grant a relief for violation of a right or fundamental freedom must lead in a precise manner the Constitutional provisions that have been violated or infringed and the manner of infringement as well as the jurisdictional basis for it as was held in the case of **Anarita Karimi Njeru vs Republic (No. 1) [1979] KLR 154**.

12. That the Petitioners had precisely stated the infringement and violation of their rights in specific terms. That if the court was persuaded that the proceedings ought to have been initiated by way of ordinary suit or otherwise as opposed to the Petition, then the court be reluctant to dismiss the Petitioners' Petition on a technicality.

13. That the Respondents' Preliminary Objection did not meet the threshold set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** where it was held that a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued on a preliminary point may dispose of the suit.

14. That further, the Preliminary Objection should be founded upon a settled and crisp point of law to the extent that the facts in the Petitioners' Notice of Motion and the Petition were undisputed. The issues raised by the 1st Respondent in the Preliminary Objection in paragraph 1 and 2 were contested issues by the Petitioners and this court will therefore have to investigate the disputed facts, that the Preliminary Objection therefore ought to be dismissed.

Determination.

15. Upon consideration of the Petitioners Petition and the Preliminary Objection raised I am obliged to revisit the all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** A Preliminary Objection per Law J.A. was stated to be thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the same case Sir Charles Newbold, P. stated:

‘a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.’

16. From the submissions and pleadings filed in this Petition, it is clear that the Respondents herein are challenging the Petitioner’s Petition dated the 26th May 2019 and filed on the same day to the extent that the Petitioners ought to have been filed an ordinary suit as provided for by procedure because the present Petition did not raise any breach of the Constitution.

17. I have carefully considered the content of the Petitioner’s Petition as well as the supporting affidavit. I have also considered the Respondents’ replying affidavits and the submissions of Counsel as well as the relevant provisions of the law and Authorities herein cited. I find the issues arising for determination are as follows:-

- i. Whether the Petitioners’ Constitutional rights had been infringed.
- ii. Whether the Petitioner is entitled to the orders sought in the Petition?

18. From the above captioned Petition, the Petitioners have alleged that their Constitutional right envisaged under Article 40 of the Constitution had been violated by the Respondents herein. For ease of reference, I shall set out the said provision of the law as;

19. Article 40 of the Constitution provides a follows:-

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

20. Article 40(1) sets out the general right of every Kenyan to acquire and own property. There is no allegation in the pleadings that the Petitioner has been denied the right, either individually or in association with others to acquire or own property of any description in Kenya. In the Petitioner’s case, they were given an opportunity to own land but through an alleged act of fraud, the 1st Respondent’s had acquired

the suit land which he had later transferred to the 2nd Respondent.

21. Article 40(2) limits the authority of Parliament to pass certain types of legislation affecting property. First, legislation that deprives a person of property arbitrarily and second, legislation that restricts enjoyment of any right to property in a manner that is discriminatory in terms of Article 27(4) of the Constitution. The Petitioner did not complain of any such breach.

22. Article 40(3) and (4) deal with the deprivation of property by the state on terms specified, that is, for a public purpose or in the public interest and upon payment of compensation. There is no complaint in this matter to trigger the application under Article 40(3) or entitle the Petitioners to compensation.

23. The Petitioners have not made out any case that their property is being acquired in the manner contemplated by Article 40 of the Constitution to trigger application of Article 40(3) and (4). There has been no breach of Article 40, of the Constitution. It is in this respect that the Petitioner's claim must fail.

24. The question of what constitutes a Constitutional question was ably illuminated in the South African case of **Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others [2002] 23 ILJ 81 (CC)** in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak* notes that:-

"The Constitution provides no definition of "Constitutional matter." What is a Constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions ofthe Constitution, Constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also Constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine Constitutional matters and issues connected with decisions on Constitutional matters is clearly an extensive jurisdiction."

25. Section 3A of the Civil Procedure Act, provides as follows;

"Nothing under the Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court."

26. The court in the case of **Maggie Mwauki Mtalaki v Housing Finance Company of Kenya [2015] eKLR** held that the provision of Section 3A of the Civil Procedure Act;

'...finds its expressions in Article 159(2)(d) and (e) of the Constitution which requires the court to administer justice without undue regard to procedural technicalities, and to promote the purpose and principles of the Constitution, the essential values of human rights, equality, freedom democracy, social justice and the rule of law. The essential test in Article 159(2) (d) and (e) of doing substantial justice is the avoidance of procedural technicalities. There is however no technicality where the Constitution and the law is clear.

27. In **Bethwell Allan Omondi Okai vs TELKOM (K) LTD (Founder) and 9 Others [2013] eKLR**. The court applied the holding by the Court of Appeal in **Speaker of National Assembly vs Njega Karume** where that court held that ;

"In our view, there is considerable merit in the submission that where there is clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed."

28. The above principle was not lost to the Court in **John Harun Mwau vs Peter Gastrow & 3 Others [2014] e KLR** where the court said -

"Courts will not normally consider a Constitutional question unless the existence of a remedy depends on it; if a remedy is available to an Applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights.

... It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the Constitutionality of a statute only when it is necessary for the decision of the case to do so."

29. The Constitution is not to be invoked unless the Constitutionality is itself in question, in **Leonard Jefwa Kalama & Another vs Consolidated Bank of Kenya Ltd. & 3 Others [2014] eKLR**, the court said-

"unless it can be shown that the law itself is against the Constitution, the sale of charged property in accordance with due process of that law cannot be held to be unconstitutional deprivation of property within Article 40 of the Constitution, this is because the Constitution has as one of its principles of governance and national values under Article 10, the doctrine of the rule of law."

30. I find that in the present suit disguised as a Petition, the Petitioners herein seek for redress from the court from the alleged Respondents' fraudulent acts in obtaining the suit land, acts which must be proved above the balance of probabilities but not beyond reasonable doubt. I further find that the acts complained of by the Petitioners did not *concern the status, powers and functions of an organ of State*. There are no specific provisions of the Bill of Rights that have been infringed and further, the Petition does not disclose any violation of Constitutional rights as alleged. In this regard therefore I uphold the Preliminary Objection dated the 8th April 2019 and proceed to strike out the Petition dated the 26th March 2019 with costs to the Respondents.

Dated and delivered at Nyahururu this 26th day of November 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE